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JUDICIAL EXAMINATION OF THE ACCUSED—A REMEDY FOR THE THIRD DEGREE*

Paul G. Kauper†

IN its report on "Lawlessness in Law Enforcement" the Wickersham Commission concludes that in the police systems of a number of American municipalities the "third degree" is very generally practiced as a means of extorting from accused persons under arrest confessions, incriminating statements, and other information of value to the police.¹ The conclusion of the Commission confirms the results of private investigation made in the same field.² It is true that the methods of inquiry pursued by the Commission leave doubt as to the accuracy of some of the facts reported.³ But the quality of the evidence submitted as the result of this and prior investigations establishes at least a residuum of "naked, ugly facts," the authenticity of which cannot reasonably be denied.

Assuming third degree practices by the police to be an established fact, the problem of a remedy for the evil demands consideration.⁴

*The writer wishes to acknowledge his indebtedness to Professor John B. Waite of the Michigan Law School for his many helpful criticisms and suggestions in the preparation of this article; the writer, however, assumes sole responsibility for all that appears therein.

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¹ WICKERSHAM COMM. REP. NO. 11, Part I, "The Third Degree" (1931). In connection with this official report, see also the recent publication, *OUR LAWLESS POLICE*, by ERNEST JEROME HOPKINS, one of the official investigators employed by the Commission. His observations as to third degree practices are found in chapters 13-18.

² See J. A. Larson, "Present Police and Legal Methods for the Determination of Innocence or Guilt of the Suspect," 16 J. CRIM. L. 219-271 (1925); B. Booth, "Confessions and the Methods Employed in Procuring Them," 4 So. CAL. L. REV. 83 (1930).

³ See Professor Waite's criticism of the Commission's method of investigation in his comment on Report No. 11, 30 MICH. L. REV. 54-58 (1931). Also his review of HOPKINS, *OUR LAWLESS POLICE*, in 30 MICH. L. REV. 820 (1932).

⁴ For an analysis of proposed remedies see Z. Chafee, Jr., "Remedies for the Third Degree," 148 ATLANTIC MONTHLY 621 (1931). The value of Professor Chafee's discussion is enhanced by the fact that he was one of the "Consultants" employed by the Wickersham Commission. Apparently his investigation in this capacity has convinced him of the futility of proposed remedies suggested by him seven years earlier in an article, "Compulsory Confessions," 40 NEW REPUBLIC 266 (1924).

It is undoubtedly true, as pointed out by the Wickersham Commission, that a fundamental line of approach in solving the problem of the third degree is to improve the police personnel and develop a scientific detective technique. This article,

Such practices discredit the administration of criminal justice; they often subject innocent persons arrested to a species of coercion reminiscent of the days of the Inquisition. But even if the accused is guilty, they violate constitutional rights meant for the protection of *all*, they engender disrespect for law-enforcing agencies, and they impair the morale of the police system itself.

Judicial examination of the accused, we shall suggest in the following discussion as the most promising remedy for these police abuses. But before considering this suggestion in detail it is essential to refer to other remedies now in vogue or which have been proposed.

CRIMINAL AND TORT LIABILITY

The checks on illegal activities of the police on which reliance is mainly placed today are civil and criminal liabilities. At common law an officer who makes an arrest is liable in tort for the use of force in excess of that required to preserve custody.⁵ Similarly he is liable for criminal assault and in a number of states express legislation has attached criminal liability to the acts of an officer in coercing a prisoner to confess.⁶ Yet, despite existing liabilities in crime and tort, the third degree flourishes. Nor can it be expected that such liabilities will supply the requisite deterrent. As regards civil liability the restraining influence if any must be measured by the offending officer's capacity to respond in damages; if he is judgment-proof, it is not difficult to calculate the quantum of deterring influence.⁷ The jury's sympathy in favor of one regarded as a protector of the social order makes it difficult for the plaintiff to secure a verdict in such a case. Basically it is unsound to rely on private litigation to curb defects in administrative law. That should be the duty of the state.⁸ But even granting the correctness of the theory in relying on tort liability to make police officers behave themselves, and granting that the aggrieved plaintiff is financially able to institute a suit, and granting that the jury will return a verdict against the delinquent officer, and granting that the defendant has assets sufficient to make the judgment worth more than a flourish, it is still unlikely that third degree practices will be affected

however, is concerned only with a proposed change in criminal procedure as a means of contributing to the solution of the problem.

⁵ AM. L. INST. TENTATIVE RESTATEMENT OF TORTS, No. 3, sec. 157, and comment thereon (1927).

⁶ The statutes are collected in WICKERSHAM COMM. REP. No. 11, 213 (1931).

⁷ See Bohlen and Shulman, "Effect of Subsequent Misconduct Upon a Lawful Arrest," 28 COL. L. REV. 841, 844, note 11 (1928).

⁸ Bohlen and Shulman, 28 COL. L. REV. 841 (1928).

by this remote penalty. The use of the fist and rubber hose as auxiliary measures in extracting confessions from a recalcitrant prisoner is a response to the police exigencies of the moment. A police detective anxious for clues is not going to speculate on the possibilities of losing his house eighteen months from now as a result of slapping the prisoner's face or giving his wrist an uncomfortable twist. The same considerations are germane in discussing the deterring effect of criminal liabilities. If the penalty is severe, the difficulty is augmented of getting a sympathetic jury to return a verdict of guilty against one whose offense was a misguided zeal exercised for the public good.⁹ Fellow-officers are under a strong inducement to give perjured testimony in order to clear their comrade on the force. Moreover, the prosecuting attorney who by tacit acquiescence, to say nothing of express approbation, encourages officers to procure confessions, thereby lightening the labor of his office, is not likely to be zealous in prosecuting official lawlessness. Add to all this the hiatus in time and psychological difference between the immediate desire for clues and the remote threat of the penalty and we must perceive that the deterring influence of criminal as well as civil liability is of a very attenuated nature.¹⁰

MAKING CONFESSIONS OBTAINED BY POLICE INADMISSIBLE

Another remedy — one that has been recently proposed — is to make confessions obtained by the police inadmissible in evidence. This would operate, it has been thought, indirectly to check illegal practices by rendering futile the work of the officers in obtaining confessions. Attempted legislation in California in 1929 represent the most extreme of these proposals. It would make inadmissible any confession except a voluntary statement made before a magistrate after the prisoner had been informed of his rights including the right to counsel.¹¹ A saner

⁹ Illustrating the practical difficulty in securing a conviction under such a statute, the opinion of the Indiana court in *Bonahoon v. State* (Ind. 1931) 178 N. E. 570, sustaining a conviction of police detectives under such an act, mentions the fact that at the trial prominent citizens of Fort Wayne testified regarding the good character and reputation of the defendants.

¹⁰ Professor Chafee, writing in 148 *ATLANTIC MONTHLY* 621, 623 (1931), is of the opinion that "criminal statutes have no appreciable tendency to check these abuses."

¹¹ B. Booth, 4 *So. CAL. L. REV.* 83, 84 (1930). Similar in terms to the defeated California bill was the suggestion made by Messrs. Chisolm and Hart in their paper, "Methods of Obtaining Confessions and Information From Persons Accused of Crime," presented before the American Prison Association in 1921, Russell Sage Foundation Publication No. CH43, 18 (1922), prohibiting police interrogation or examination of the accused except in the presence of a Public Defender or accused's

recommendation of this type would make a confession admissible only if the state showed it to be a voluntary statement spontaneously made by the accused to the police, but would exclude confessions elicited by police interrogation unless under the supervision of a magistrate.¹² This approximates the English rule requiring that an officer caution the prisoner before interrogation and forbidding cross-examination except for the purpose of explaining an ambiguity after a voluntary statement has been made.¹³

Proposals of this type are objectionable on several grounds. The psychological moment for a voluntary confession, as Dean Wigmore has pointed out, comes *immediately* after arrest when the prisoner is laboring under the psychic pressure of guilt and feels most acutely the hopelessness of his position.¹⁴ At this precise moment the desire for relief by making a "clean breast" is at its height. With the passage of time and intervention of friend and counsel, a defense mechanism is set into motion. From the public's point of view it would be unwise to repress confessions made by the accused while in police custody. Nor should the mere fact of interrogation, unaccompanied by coercive methods, vitiate the undoubted evidentiary worth of a confession thus procured.

And would a statute rendering inadmissible all statements taken by the police contribute in any substantial way to mitigate third degree abuses? Would police motives for interrogation be repressed by placing the taint of inadmissibility on the information thus procured? The third degree has utility for the police apart from procuring a confession to be used at the trial some time later. Coercive questioning of the suspected person is *immediately* useful to the police in unearthing other evidence of guilt, in pumping for information as to the whereabouts of stolen property, and in inducing the arrested man to "squeal" on his partners. In a day when corporate crime and gang warfare are ram-

own counsel. See also F. Irvine, "Third Degree and the Privilege Against Self Crimination," 13 CORN. L. Q. 211, 217 (1928).

¹² A recommendation to this effect is found in Report of Crimes Survey Committee of Law Association of Philadelphia 467 (1926).

¹³ 71 SOL. J. 686 (1927). In 74 SOL. J. 633-634 (1930) is found a reprint of the Memorandum issued by the Home Secretary regarding the taking of statements from persons in custody.

A Texas statute rendering inadmissible a confession unless in writing, and made only after full caution, and a Kentucky statute prohibiting sweating are the only legislative enactments in this country at the present time placing such restrictions on the procurement of confessions and on police interrogation of the prisoner. See B. Booth, 4 SO. CAL. L. REV. 83, 86 (1930).

¹⁴ 2 WIGMORE, EVIDENCE, 198 and note (1923).

pant, this last consideration furnishes a strong impelling motive for third degree practices. Furthermore, little comfort is afforded an innocent man who has been a victim of abusive police methods by the assurance that if he had gone on trial, any statement pressed out of him would not have been admissible in evidence. It seems, then, that from the viewpoint of remedying the third degree evil, little if any good will be accomplished by departing from the orthodox rule that a confession is admissible if voluntarily made.¹⁵ And in view of the desirability of admitting confessions obtained by the police without resort to force, the modicum of benefit that might be expected of the proposed measure would not be worth the price.¹⁶

REQUIRING POLICE TO PRESENT PRISONER IMMEDIATELY BEFORE A MAGISTRATE

Third degree methods could be largely repressed if police were forced to present their prisoner immediately before a magistrate. Professor Chafee appropriately calls the period of police custody the "danger period."¹⁷ And the whole problem of the third degree seems to resolve itself into one of reducing this danger period to a minimum.¹⁸ The measures already discussed fail of their purpose because they bring no pressure on the officer to compel him to produce the prisoner at once for a judicial hearing. It is true that the police cannot be deprived completely of opportunity for private interrogation, how-

¹⁵ The general rule is stated and discussed and the American cases collected in 2 WIGMORE, EVIDENCE, sec. 851 (1923). It is assumed that this rule will exclude confessions made after prolonged interrogation and detention, as was held in *Ziang Sung Wan v. United States*, 266 U. S. 1, 45 Sup. Ct. 1, 69 L. ed. 131 (1924), in which it was said by Mr. Justice Brandeis: "A confession is voluntary in law if, and only if, it was, in fact, voluntarily made."

¹⁶ It is true, as pointed out by the WICKERSHAM COMM. REP. No. 11, 53 (1931), that in England police do not practice third degree methods. Though this may be ascribed to the greatly circumscribed power of interrogation allowed the police, a more persuasive explanation is to be found in the habits and morale that characterize the English police.

Very little evidence is available on the question whether federal officers employ third-degree methods. It is generally believed that they do not. The absence of such abusive practices in the federal system of law enforcement may be attributed to two factors: the revolting types of crime — murder in particular — which in the eyes of the police justify coercive questioning, are seldom triable in federal courts; and federal judges, because of their life tenure and freedom from political control, would not readily tolerate such abuses.

¹⁷ 148 ATLANTIC MONTHLY 621, 622 (1931).

¹⁸ This assumes that after the police have brought the prisoner before a magistrate they cease to have control over his person, and the accused is thereafter turned over to the county jailer for custody. See 148 ATLANTIC MONTHLY 621, 625 (1931).

ever prompt the production before the magistrate. If an arrest is made at night and the magistrate is not available until the next morning, a number of hours must necessarily elapse while officers continue in control of the accused's person. But the officer dare not resort to violent physical abuse leaving visible welts and bruises on the prisoner's body, for prompt production before the magistrate will mean exposure of the unlawful acts. Third degree practices wilt under publicity. In addition, prompt production of the accused before a magistrate eliminates the further type of police brutality resulting from prolonged interrogation and detention *incommunicado*.

In point of fact it has long been the rule that an officer is under a duty to bring an arrested person before a magistrate immediately. Such was the common-law rule in regard to criminal procedure, and is the rule today.¹⁹ Statutes in a number of states expressly require that the accused be taken before a magistrate "without unnecessary delay" for the purpose of a preliminary examination.²⁰ This is the rule adopted in the American Law Institute's Code of Criminal Procedure.²¹ Similarly in the field of tort liability, an officer who detains the arrested person for an unreasonable length of time is liable in an action for false imprisonment.²² But the rule is not being enforced. Unlawful detention of the prisoner *incommunicado* so as to permit prolonged interrogation by the police, coupled with denial to the prisoner of food, sleep, and rest, constitutes one of the flagrant abuses of the present system.²³ In Chicago, illegal detention and detention *incommunicado* are said to be common²⁴ although the records show no irregu-

¹⁹ 4 BL. COMM. *296; 1 CHITTY, THE CRIMINAL LAW *59. The latter writes: "When the officer has made his arrest, he is, as soon as possible, to bring the party to the gaol or to the justice . . . and if he be guilty of unnecessary delay, it is a breach of duty."

²⁰ AM. L. INST. CODE OF CRIM. PROC., Tentative Draft No. 1, commentary to sec. 35 (1928).

²¹ Official Draft, sec. 35 (1930).

²² COOLEY, TORTS 258 (Throckmorton's ed. 1930); AM. L. INST. COMMENTARIES ON TORTS RESTATEMENT No. 3, sec. 161, p. 67 (1927); AM. L. INST. TENTATIVE RESTATEMENT OF TORTS No. 3, sec. 161, comment to clause (c), p. 135 (1927).

Under the majority rule the officer who fails to produce the prisoner before a magistrate promptly becomes liable as a trespasser *ab initio*. COOLEY, TORTS 250 (Throckmorton's ed. 1930). The rule is criticized by Bohlen and Shulman in 28 COL. L. REV. 841, 849 (1928) as a survival of the earlier practice of bolstering up the inadequacies of administrative justice through tort liability.

²³ WICKERSHAM COMM. REP. No. 11, 72 *et seq.* (1931); HOPKINS, OUR LAWLESS POLICE, ch. 15 (1931).

²⁴ A. J. BEELEY, THE BAIL SYSTEM IN CHICAGO 24-26 (1927).

larity, due to false entries on the police blotter.²⁵ In Dallas, Texas, the "incommunicado cell" has institutionalized the practice of illegal detention which may last for even a week or more.²⁶ In Philadelphia, the prisoner is held in "cold storage" until he assumes a penitent mood.²⁷ In Detroit, the police, by taking the prisoner "around the loop," effectively keep him in custody beyond the legal period; even when the accused's attorney, after learning of his client's plight and whereabouts, sues out a writ of habeas corpus, twenty-four hours are allowed for a return on the writ, in accordance with an agreement worked out between judges, prosecutors, and police.²⁸

Here, then, is an existing provision that on the face of it should check third degree practices. But it is not accomplishing that result. Police-magistrates and justices of the peace do not insist that officers bring the accused before them promptly. Judges, along with prosecutors, police, and public, share the belief that extra-judicial interrogation is indispensable to the efficient administration of justice. If it be said with dogmatic correctness that judges and magistrates, mindful of their duty, should not sanction a departure from recognized rules of such vital importance to the prisoner, as a concession to police exigencies, it is answered that the system of electing judges is not calculated to produce that firmness of judicial action which will stand against a popular clamor for conviction at all costs.²⁹ A judge whose continued tenure of office depends on public approbation, and who believes that interrogation of the accused by the police is essential to protect the public against crime, is not inclined to remonstrate with police officers for failing to produce the prisoner for hearing promptly.

Prompt and regular presentation of the accused before a magistrate

²⁵ WICKERSHAM COMM. REP. NO. 11, 127 (1931).

²⁶ WICKERSHAM COMM. REP. NO. 11, 138 (1931).

²⁷ HOPKINS, OUR LAWLESS POLICE 171-175, 231 (1931).

²⁸ WICKERSHAM COMM. REP. NO. 11, 120-122 (1931); HOPKINS, OUR LAWLESS POLICE 128-136 (1931).

²⁹ "It is expecting too much of a judge who is elected for a short term on a small salary, who loses his practice on taking office, and who will soon be confronted with the exigency of reelection and campaigning therefor, to exert the needed authority at the probable expense of incurring unpopularity by so doing." WICKERSHAM COMM. REP. NO. 8, 41 (1931). See also Stuart H. Perry, "The Courts, the Press, and the Public," 30 MICH. L. REV. 228, 233 (1931).

Professor Moley, in writing of the police magistrates' courts, says: "Machine politics is always heavily entrenched in the inferior courts." OUR CRIMINAL COURTS 29 (1930). The Wickersham Commission in its Report No. 11, 107 (1931), comments on the fact that in Boston, where police judges have a life tenure and consequently are politically independent, prompt arraignment of the prisoner is insisted upon by the judges.

will not be considered normal procedure, nor will the rule be enforced by either police or magistracy, unless some effective method of interrogation before a magistrate can be substituted for the illegal interrogation of the accused which is now carried on by police.

At this point it is necessary to turn to a consideration of the distinction between judicial interrogation of the accused, which is here proposed, and the ordinary preliminary examination which is already in vogue. The purpose of the preliminary examination is to determine whether there is a *prima facie* case for holding a suspected person for action by the grand jury or the prosecuting authorities. The requirement of prompt presentation of the accused before a magistrate is intended to expedite the preliminary examination and prevent the prisoner's indefinite detention on mere suspicion. The preliminary examination serves as an opportunity for the prisoner to exculpate himself at the earliest possible moment. But it does not give an opportunity—as judicial examination would be intended to do—for interrogating the prisoner himself or eliciting information from him.³⁰ To appreciate the significance of the distinction between preliminary examination and judicial examination which is here proposed, the history and present status of the preliminary examination in Anglo-American criminal procedure must first be understood.

1. *Preliminary Examination in England*

In England the justice of the peace appeared at the outset as a royal officer armed with plenary police powers for the purpose of protecting the king's peace.³¹ It is believed that justices early developed the custom of making some kind of inquiry before they committed suspected persons for formal accusation.³² The existing practice was legal-

³⁰ See Professor Waite's comment on the WICKERSHAM COMM. REP. No. 11, in 30 MICH. L. REV. 54, 58 (1931). The term "preliminary examination" is really a misnomer as applied to the modern preliminary hearing of the judicial inquiry type. Under the old English statutes of Philip and Mary there was a true examination—an interrogation by the magistrate of the prisoner for the purpose of securing information. The term *examination* persists, however, in modern procedure when what is meant is a preliminary *hearing*. As a matter of precise terminology we should distinguish between judicial examination and judicial hearing. But the term "preliminary examination" is so thoroughly established in current usage as a legal word of art with reference to the preliminary hearing that confusion might result if it were used in the more accurate sense to denote magisterial interrogation.

³¹ See CHARLES A. BEARD, *THE OFFICE OF THE JUSTICE OF THE PEACE IN ENGLAND IN ITS ORIGIN AND DEVELOPMENT* (1904).

³² MOLEY, *OUR CRIMINAL COURTS* 15 (1930).

ized by the statutes of Philip and Mary (1554-1555) which provided that justices of the peace, before committing or admitting to bail a prisoner charged with a felony, should *take the examination* of such prisoner and the information of those who brought him, the same to be reduced to writing.³³ As a formal device this institution was probably derived from Continental procedure.³⁴ But, it should be emphasized, the principle of interrogation as such was not unknown to the common law.³⁵ Holdsworth justified the procedure adopted by the statutes of Philip and Mary as necessary in the sixteenth century "in order to secure the observance of the law and to protect the state against its enemies."³⁶ Under the statutes the examination, judicial only to the extent that it provided for the hearing of witnesses, resembled chiefly the inquisitorial proceeding of the Continent. The accused was fully questioned as to all circumstances connected with his supposed offense.³⁷ There was apparently no limit to the length of time allowed for the inquiry; the justice often remanded the prisoner to gaol for further detention, and subsequently ordered another hearing after new evidence was uncovered.³⁸ The accused was not informed of the evidence against him,³⁹ and he was not entitled to counsel at the examination.⁴⁰ The evidence was preserved⁴¹ in writing for the judges

³³ 1 & 2 P. & M., c. 13, sec. 4 (1554); 2 & 3 P. & M., c. 10, sec. 2 (1555).

³⁴ Bentham in 5 RATIONALE OF JUDICIAL EVIDENCE 289 (1827), refers to it as "a sprig of common sense imported from the continent of Europe." See also ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 87 (1930).

³⁵ Stephen, 1 JURIDICAL SOCIETY PAPERS 456, 466 (1858); 4 WIGMORE, EVIDENCE 810, 811 (1923). It was said by Lord Bacon in Countess of Shrewsbury's Case, 2 State Trials 770, 778 (1612): "No subject was ever brought in causes of estate to trial judicial, but first he passed examination; for examination is the entrance of justice in criminal causes: it is one of the eyes of the king's politic body: there are but two — information and examination: it may not be endured that one of the lights be put out by your example."

It is a cherished notion but one lacking in historical foundation that the principle of interrogation of the accused formally adopted by the statutes of Philip and Mary was opposed to the common-law tradition. 4 BL. COMM. *296; 1 CHITTY, THE CRIMINAL LAW *83 (1836); 1 GREENLEAF, EVIDENCE, sec. 224 (1892).

³⁶ 4 HISTORY OF ENGLISH LAW 529 (1924).

³⁷ 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (1883).

³⁸ 1 CHITTY, THE CRIMINAL LAW *73 (1836).

³⁹ MOLEY, OUR CRIMINAL COURTS 16 (1930).

⁴⁰ Cox v. Coleridge, 1 B. & C. 37, 107 Eng. Repr. 15, 19 (1822). The examination by the justice of the peace, it will be noted, corresponded in many details with present-day police methods of interrogating the accused.

⁴¹ On the trial it was immaterial to the admissibility of such record that questions had been asked by the examining justice. 2 WIGMORE, EVIDENCE, sec. 848 (1923).

at the trial, and almost the first step in the later proceeding was to read to the jury this compulsory examination of the accused.⁴²

Under the statutes of Philip and Mary a justice of the peace really acted as police, constable, detective, prosecuting attorney, examining magistrate and complaining witness.⁴³ In the hands of unscrupulous magistrates such a system lent itself to abuse.⁴⁴ Prosecuting zeal prevailed over judicial disinterestedness. Harsh methods were employed in the procurement of evidence and the treatment of the prisoner.⁴⁵ Leading and ambiguous questions were asked to confuse him.⁴⁶ Treachery and corruption were common sins of the justices, so that the preliminary examination became an instrument of blackmail and oppression.⁴⁷ But in spite of all this the ancient English justice of the peace, in exercising his power to interrogate the prisoner, compared favorably with some modern police in one respect — he did not resort to torture as a regular part of his practice.⁴⁸

The statutes of Philip and Mary, insofar as they ordained an inquisitorial preliminary examination, were doomed to suffer judicial nullification. By the beginning of the 18th century the rule against self-incrimination was fully established. The spirit of that rule must have been carried over to the preliminary examination, for in this examination there was evident a gradual abandonment of judicial interrogation of the accused.⁴⁹ The practice developed of taking only a voluntary statement by the accused after cautioning him as to his

⁴² 4 WIGMORE, EVIDENCE 811 (1923); E. D. Corwin, "Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1 at 3 (1930).

⁴³ Judge Simeon E. Baldwin, "Preliminary Examination in Criminal Proceedings," 6 A. B. A. REP. 225, 230 (1883); 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 225 (1883); MOLEY, OUR CRIMINAL COURTS 15 (1930).

⁴⁴ "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial." 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 222 (1883).

⁴⁵ Several instances are related in 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 222 (1883). See the account of Magistrate Aleyn in MOLEY, OUR CRIMINAL COURTS 14 (1930).

⁴⁶ MITTERMAIER, STRAFVERFAHREN 69 (1851).

⁴⁷ MOLEY, OUR CRIMINAL COURTS 16, *et seq.* (1930).

⁴⁸ MOLEY, OUR CRIMINAL COURTS 16, *et seq.* (1930).

⁴⁹ William A. Maury, "Validity of Statutes Authorizing the Accused to Testify," 14 AM. L. REV. 753 at 757, 761 (1880); MITTERMAIER, STRAFVERFAHREN 69, 70 (1851). The difference between the earlier practice carrying out the purpose of the statute and the later practice departing from it is adverted to in his caustic fashion by Bentham in 5 RATIONALE OF JUDICIAL EVIDENCE 256, 257 (1827).

rights.⁵⁰ It was even questioned in a late case under these statutes whether the justice had a right to interrogate the prisoner, so uncommon had the practice of interrogation become.⁵¹ Though the statutes did not grant the right, the practice was developing of permitting the accused to have counsel at this examination.⁵² The preliminary examination was no longer looked upon as a device for the more effective prosecution of the prisoner but had come, instead, to be regarded as a privilege of the accused whereby an opportunity was given him for self-exculpation.⁵³

A factor hastening the transformation of the preliminary examination from an inquisitorial proceeding into a judicial inquiry was the gradual sloughing off by justices of the peace of their duties as police and prosecuting officials and the fixing of their status as judicial officers. The final differentiation in function of magistrate and policeman was signalized by the creation in the early part of the last century of an independent metropolitan police.⁵⁴ Long before 1848, the inquisitorial preliminary examination as provided for by the statutes of Philip and Mary had sunk into oblivion and a purely judicial inquiry had supplanted it. In that year, a statute formally repealed the provisions dating from 1554 and 1555, and definitely established the judicial inquiry type of preliminary examination in English criminal procedure.⁵⁵ Under this statute, the prisoner, after the examination of witnesses for the state, is asked if he cares to make a statement, but is first warned that he is under no obligation to do so, and that whatever he may say will be used against him.⁵⁶ Judicial interrogation of the prisoner is considered improper in modern English practice.⁵⁷ Though the statute

⁵⁰ 1 CHITTY, CRIMINAL LAW *85 (1836); *Rex v. Green*, 5 Car. & P. 312, 172 Eng. Repr. 990 (1832).

⁵¹ *Rex v. Wilson*, 1 Holt N. P. 597, 171 Eng. Repr. 353 (1817). This case was disapproved however in *Rex v. Ellis*, R. & M. 432, 171 Eng. Repr. 1073 (1826). See Stephen, 1 JURIDICAL SOCIETY PAPERS 456, 469 (1858).

⁵² The practice is referred to in *Cox v. Coleridge*, 1 B. & C. 37, 107 Eng. Repr. 15, 19 (1822).

⁵³ 1 CHITTY, CRIMINAL LAW *83 (1836). See also JOY, CONFESSIONS 92-94 (1843).

⁵⁴ See MOLEY, OUR CRIMINAL COURTS 19 (1930). Also MAITLAND, JUSTICE AND POLICE 100 (1885).

⁵⁵ 11 & 12 Vict., c. 42, sec. 18 (1848). The provisions of this act relating to the preliminary examination of the accused were not substantially altered by the Criminal Practice Act of 1925, 15 & 16 Geo. V., c. 86, sec. 12.

⁵⁶ The changes affected by this legislation in relation to the early statutes of Philip and Mary are discussed in 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (1883), and MOLEY, OUR CRIMINAL COURTS 19 (1930).

⁵⁷ 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 441 (1883); 2

does not require the preliminary examination to be open to the public, it is so in practice.⁵⁸ The same holds true as to the right to counsel.⁵⁹ The preliminary examination is a judicial inquiry conducted for the purpose of determining whether the evidence presented justifies continued retention of the prisoner either in custody or on bail to await formal accusation, and admits of no interrogation by the magistrate. This type of examination is today firmly entrenched in English practice and accords with the tradition of scrupulous fairness to the accused that characterizes criminal procedure in that country.⁶⁰

2. *Preliminary Examination in America*

In America the history of preliminary examination follows a course parallel to that run by the English institution whence it was derived. Despite the modern notion that judicial interrogation of the accused is in contravention of common-law traditions,⁶¹ early colonial history reveals that interrogation by the magistrate was common practice.⁶² The

WIGMORE, EVIDENCE 185 (1923). There is a mistaken belief on the part of some in this country that English practice authorizes the asking of questions of the accused by the magistrate. See, for instance, 12 A. B. A. J. 692, art. i, note (1926).

⁵⁸ AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 185 (1928).

⁵⁹ AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 185 (1928).

⁶⁰ The English attitude favoring the judicial inquiry type of preliminary examination as fairer to the prisoner in contrast with the inquisitorial system of the Continent is reflected in 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 441 (1883); REPORT OF COMMISSIONERS ON CRIMINAL LAW IN THE CHANNEL ISLANDS, an excerpt from which is found in 4 WIGMORE, EVIDENCE 825 (1923).

⁶¹ See FOURTH REPORT OF THE NEW YORK COMMISSIONERS ON PRACTICE AND PLEADING — CRIMINAL PROCEDURE, xxvii (1849); *In re Bates* (D. C. S. C. 1858) 2 Fed. Cas. No. 1099a; *Kelly v. State*, 72 Ala. 244 (1882); *Commonwealth v. Smith*, 185 Pa. St. 553, 569, 40 Atl. 73 (1898).

⁶² Early colonial practice is reflected in the following excerpt from GOVERNOR WILLIAM BRADFORD'S HISTORY OF PLYMOUTH PLANTATION 390:

"2. Quest: How farr a magistrate may extracte a confession from a delinquent, to acuse him selfe of a capitall crime, seeing *Nemo tenetur prodere seipsum*.

"Ans: A Majestrate cannot without sin neglecte diligente inquisition into the cause brought before him. If it be manifest that a capitall crime is committed, and that comone reporte, or probabilitie, suspition, or some complainte (or the like), be of this or that person, a magistrate ought to require, and by all means to procure from the person (so farr allready bewrayed) a naked confession of the fact, as appears by that which is morall and of perpetuall equitie . . . for though *nemo tenetur prodere seipsum*, yet by that which may be known to the magistrate by the forenamed means, he is bound thus to doe, or else he may betray his cuntrye and people to the heaveie displeasure of God. . . ."

The most noteworthy illustration extant on the records was the examination of Ann Hutchinson by the court at Newtown in 1637. See 1 HART, AMERICAN HISTORY TOLD BY CONTEMPORARIES 382 (1898); C. F. ADAMS, ANTINOMIANISM IN THE COL-

statutes of Philip and Mary formally instituting the inquisitorial type of preliminary examination were part of the colonial law and were considered operative after the separation from England.⁶³ It is probably true, however, that interrogation of the accused as a general practice ceased long before the repeal of the statutes of Philip and Mary and the legislation which created the judicial inquiry type of examination.⁶⁴ The establishment of the rule against self-incrimination, with its significant reaction in England resulting in abolition of the practice of interrogating the accused, had the same effect in the American colonies. Formal constitutional recognition of the rule contributed to the tradition already accumulating against exercise of inquisitorial powers by the magistrate or justice of the peace. In addition there were in American history forces inimical to the exercise of police functions by a magistrate. In a frontier country the prosecuting attorney, and even more the sheriff, eclipsed the justice of the peace as investigators of crime.⁶⁵ The idea of separation of powers peculiar to the American political system further emphasized the differentiation in function between police and magistrate, thereby leaving in sharper profile the judicial character of the latter's office.⁶⁶ But insofar as the statutes did not fall into disuse they were eventually repealed by express legislation. It is true that under some of the earlier statutes, representing a departure in only some features from those of Philip and Mary, unlimited power of interrogation was still exercised by the magistrate, and though he was required to warn the prisoner of his right to keep silent, the accused's failure to speak in answer to the interrogatories was used against him at the trial.⁶⁷ Subsequent legislation put an end to that lingering practice. By 1851 all traces of the inquisitorial preliminary examination as a legally-established step of criminal procedure had dis-

ONY OF MASSACHUSETTS BAY 235-284 (1894). The writer last cited refers to this trial as "a barefaced inquisitorial proceeding." 1 THREE EPISODES OF MASSACHUSETTS HISTORY 488 (1892).

⁶³ *Respublica v. McCarty*, 2 Dall. 86 (Pa. 1781); Report of Judges of Supreme Court of Pennsylvania, Appendix in 3 Binney 620 (1808); *In re Bates* (D.C.S.C. 1858) 2 Fed. Cas. No. 1099a.

⁶⁴ "Whether, prior to the disappearance of the inquisitorial features from the English system, the American magistrates exercised like power is not entirely clear. . . . It is clear that for a long time the accepted status of the magistrate in preliminary examinations has been judicial." MOLEY, OUR CRIMINAL COURTS 20 (1930).

⁶⁵ MOLEY, OUR CRIMINAL COURTS 20 (1930).

⁶⁶ POUND, CRIMINAL JUSTICE IN AMERICA 88 (1930).

⁶⁷ This was the practice in New York as indicated by the FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING—CODE OF CRIMINAL PROCEDURE xxviii (1849). Also in Louisiana, as indicated in 1 COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 356 (1873).

appeared. Today the judicial inquiry type prevails in this country.⁶⁸ Indeed, in the absence of statutory authorization no power of interrogation is vested in the magistrate at all.⁶⁹

The purposes of the preliminary examination as conducted today are: to determine whether the evidence presented by the state justifies holding the prisoner for formal accusation, to preserve the evidence, to keep witnesses within control, to fix bail, and to allow a prisoner a chance to exculpate himself and regain freedom.⁷⁰ In all the states, after the magistrate has heard the witnesses for the prosecution, he may ask the prisoner if he wishes to make a statement; he must first caution the prisoner as to his right to keep silent, and warn him that what he says will be used against him.⁷¹ In four states legislation directs the magistrate to inform the defendant that he has a right to make a statement in his own behalf, that "he is at liberty to waive making a statement" and that "his waiver cannot be used against him on the trial"; if the defendant chooses to make a statement the magistrate then puts to him a prescribed series of questions with regard to his name and age, residence, business or profession, and concludes as follows: "Give any explanation you may think proper of the circumstances appearing against you, and state any facts which you think will tend to your exculpation."⁷² In four states provision is made that the magistrate may examine the accused.⁷³ But investigation has shown that in none of these states does the magistrate examine the prisoner as permitted by

⁶⁸AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT NO. 1, 26 (1928).

⁶⁹Kelly v. State, 72 Ala. 244 (1882).

⁷⁰1 BISHOP, NEW CRIMINAL PROCEDURE, sec. 239a (1913); Rosenberry, J., in *Thies v. State*, 178 Wis. 98, 103, 189 N. W. 539, 541 (1922); MOLEY, OUR CRIMINAL COURTS 21 (1930).

⁷¹Only a few statutes expressly authorize the magistrate to take a voluntary statement, but in the absence of express authorization it is allowed at least so as to make a confession thus obtained admissible in evidence. For collection of statutes see AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT NO. 1, 208 (1928).

⁷²AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT NO. 1, 206 (1928). Minor variations as to specific details are to be found in the statutes authorizing such limited interrogation.

In a jurisdiction that authorizes the magistrate to ask a designated set of questions, it is improper for the magistrate to ask questions other than those formally prescribed. *People v. Gibbons*, 43 Cal. 557 (1872).

The idea of a formal set of questions whereby limitations are placed on the range of the magistrate's interrogation was advanced by Livingston in his model code of criminal procedure. 2 COMPLETE WORKS ON CRIMINAL JURISPRUDENCE — CODE OF PROCEDURE, art. 173. His proposal was adopted by the New York Code Commissioners in their Report of 1849.

⁷³AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT NO. 1, 208 (1928).

the statute.⁷⁴ The explanation lies in the fact that no pressure can be brought to bear on the prisoner to make him speak, and consequently, unless he volunteers a statement, interrogation by the magistrate is wasted effort.⁷⁵

This brief résumé of statutory provisions relating to preliminary examination makes clear that no *legal* means is available for confronting the accused with the charge against him, challenging him to explain the evidence pointing to his guilt, interrogating him as to incriminating circumstances, and producing in evidence against him at the trial his refusal to explain or answer. The Wickersham Commission makes a fundamental error as to the existing law when it comes to the conclusion that "the best remedy for this evil [third degree] would be *enforcement of the rule* that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then *interrogated by the magistrate*."⁷⁶ The modern preliminary examination admits of no magisterial interrogation. No judicial pressure of any kind can be brought to bear on the accused to make him speak.

The preliminary examination is today an innocuous proceeding. Professor Moley declares, "Nearly everyone in the system believes the preliminary hearing to be practically unnecessary. . . . The prosecution views the preliminary hearing as a mere perfunctory detail."⁷⁷ It is not strange that judges are reluctant to compel the police,

⁷⁴ AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 209 (1928). Only in one state, North Carolina, where the statute is mandatory, does the magistrate examine the prisoner, and there the accused is entitled to counsel. *Ibid.*

⁷⁵ Another factor contributing to the ineffectiveness of the modern preliminary examination as a means of securing information from the prisoner, apart from the lack of power in the magistrate to interrogate the accused, is the right of the prisoner to have the aid of counsel during the examination. In a large number of states it is expressly provided that the accused shall be apprised by the magistrate of his right to counsel and that opportunity shall be given the accused to secure the aid of counsel. AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 190, 195 (1928). In New Jersey, where the accused has no right to counsel at the preliminary examination, he is nevertheless in practice granted the privilege. *Ibid.*

⁷⁶ Report No. 11, 5 (1931). (Italics ours). This erroneous assumption is pointed out by Professor Waite in 30 MICH. L. REV. 54, 58 (1931). It is possible that the Commission did not mean to state existing rules of law at this point but intended rather to suggest reforms. However, since all the requirements first mentioned are generally recognized by rules of law now existent, the coupling of these requirements with a non-existent requirement of interrogation by the magistrate is at best seriously misleading and objectionable on that ground.

⁷⁷ OUR CRIMINAL COURTS 31 (1930). See also WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 201 (1929). For a description of the operation of magistrates' courts in all their "grimy and sordid reality," see MOLEY, OUR CRIMINAL COURTS 29 (1930); also WICKERSHAM COMM. REP. No. 8, 11, 12 (1931).

whose coercive methods are productive of confessions, to observe the rule requiring prompt presentment before a magistrate in whose presence the prisoner can bask in privileged silence.

THE REMEDY PROPOSED

The preceding discussion shows the ineffectiveness of existing checks on unlawful police practices; it shows that there is no adequate legal method of interrogation at present; and it shows particularly that interrogation is necessary to satisfy the motives which actuate police in their illegal conduct and which induce magistrates to connive at it. The remedy proposed consists of two essentials:

(1) That the accused be promptly produced before a magistrate for interrogation; and,

(2) That the interrogation be supported by the threat that refusal to answer questions of the magistrate will be used against the accused at the trial.

It is submitted that the two features of the proposed plan must be linked together. The magistrate must have power to interrogate the prisoner. The present system which allows the accused an opportunity to make a statement but denies the magistrate power to ask questions is not effective for the purpose of securing information. And the power to interrogate must be supported by some compulsion to answer questions; otherwise it will be rendered impotent. Neither is the compulsion afforded by the right to comment on *failure to testify at the trial* sufficient. The comment must be upon the prisoner's *refusal to answer questions at the interrogation*. It is true that some writers have asserted that the problem of the police third degree would be solved if the judge and prosecutor were given the right to comment on the prisoner's failure to testify at his trial.⁷⁸ But analysis of that proposition makes the conclusion appear to be a *non sequitur*. The possibility that at the trial an inference of guilt may be drawn from the accused's silence is hardly equivalent in the eyes of the police to a confession or other valuable information obtained shortly after arrest. In other words, making criminal procedure at the trial more effective against

⁷⁸ Moorefield Storey, "Some Practical Suggestions as to the Reform of Criminal Procedure," 4 J. CRIM. L. 495, 503 (1913); Judge E. Ray Stevens, "Archaic Constitutional Provisions," 5 J. CRIM. L. 16, 18 (1914); Z. Chafee, Jr., 40 NEW REPUBLIC 266, 267 (1924).

It should be noted that Professor Chafee's views as expressed in 40 NEW REPUBLIC 266, 267 (1924) have been modified as a result of his investigations for the Wickersham Commission. See *supra*, note 4.

the accused does not satisfy police motives that demand interrogation immediately upon arrest.⁷⁹ The fact that in New Jersey, where comment on accused's failure to take the stand is allowed, police continue to practice third degree methods is persuasive proof that the right of comment furnishes no magic wand for the reformation of police practices.⁸⁰ For the purpose of remedying the third degree the psychic compulsion produced by the threat of comment is of no value unless that threat stares the accused in the face immediately upon arrest.

The plan proposed of requiring prompt interrogation by a magistrate supported by the threat of comment on failure to answer carries considerable promise.⁸¹ The plan necessarily involves prompt production of the accused before a magistrate. This is a *sine qua non* in the mitigation of third degree abuses, for so long as prisoners are in the control of officers there is a temptation to resort to third degree practices.

The plan provides an *immediate* opportunity for questioning the accused while the pursuit is still hot and the clues are yet fresh. By warning the accused that the whole record of the interrogation will go to the trial court, so that his silence in refusing to answer questions or make explanations will be used with telling effect against him before the jury, a strong psychic pressure will induce him to break his silence.

⁷⁹ Z. Chafee, Jr., 148 ATLANTIC MONTHLY 621, 624 (1931); WICKERSHAM COMM. REP. NO. 11, 112 (1931).

⁸⁰ HOPKINS, OUR LAWLESS POLICE 178 (1931); WICKERSHAM COMM. REP. NO. 11, 112 (1931); Z. Chafee, Jr., 148 ATLANTIC MONTHLY 621, 624 (1931).

Likewise in Ohio, where the constitutional amendment of 1912 gives the right of comment, police methods are apparently not affected thereby as indicated by third degree practices in Cleveland, WICKERSHAM COMM. REP. NO. 11, 118 (1931), and the tactics employed by the Columbus police in the Snook case. *Snook v. State*, 34 Ohio App. 60, 170 N. E. 444 (1929).

⁸¹ A number of writers have advocated magisterial interrogation as a remedy for police third-degree methods. Among them are the following: Judge Simeon E. Baldwin, in 6 A. B. A. REP. 225 at 238 (1883), whose plan is approved by Professor Waite in 30 MICH. L. REV. 54 at 58 (1931); 2 WIGMORE, EVIDENCE 199 (1923); Z. Chafee, Jr., 40 NEW REPUBLIC 266 at 267 (1924); Judge Knox, 74 U. PA. L. REV. 139 at 153 (1925); A. Johnstone, Jr., 125 ANN. AMER. ACAD. NO. 214, p. 94 (1926); National Crime Commission of Am. Bar Ass'n., 12 A. B. A. J. 692 (1926); F. Irvine, 13 CORN. L. Q. 211 at 217 (1928).

This is the remedy advocated by the WICKERSHAM COMM. REP. NO. 11, p. 5; also No. 4, pp. 26, 38 (1931). See 30 MICH. L. REV. 54, 58 (1931).

A suggestion to the same effect is found in W. Mikell's editorial preface in ESMEIN'S HISTORY OF CONTINENTAL CRIMINAL PROCEDURE xxxi (1913).

Not all the writers referred to in this note advocate the corollary measure that the refusal to answer the magistrate's interrogatories be the subject of comment at the trial.

Nor should it be forgotten that the larger number of those who are arrested are willing to speak and answer questions.⁸² Even the fact of a false statement made by a prisoner after arrest in order to cover his guilt can be used against him at the trial often with as much effectiveness as a truthful incriminating statement. Questioned immediately upon arrest, the accused does not have time to work out a coherent fabricated story or defense alibi. From the viewpoint of police psychology it appears that inauguration of a scheme of magisterial interrogation will greatly weaken the police motive for private interrogation since that motive will find vicarious expression in a substituted device. Viewing the problem historically, Dean Pound ascribes the extra-legal development of the "unhappy system of police examination" in the United States to the sloughing off by justices of the peace of their police powers, including examination of the accused, thereby leaving "a gap which in practice had to be filled outside of the law."⁸³ The proposed plan would fill the gap which resulted from the differentiation in function between magistrate and police with the effect of forcing the police to adopt the system of extra-legal interrogation. It would vest the power of interrogation in officers who are better qualified to exercise the power of interrogation fairly and effectively.

It must be conceded that the inauguration of judicial examination as here proposed would not result in the complete stamping out of third degree practices.⁸⁴ Magisterial interrogation with the right to com-

⁸² "In Washtenaw County, Michigan, of the 312 judgments of the county court in criminal cases in one year, 305 were on pleas of guilty. The prosecuting attorney's explanation of his success in obtaining so many confessions of guilt was his practice of himself interviewing every person arrested on a felony charge immediately after the arrest while he was still excited and before he had opportunity to consult with a lawyer. In that way, the prosecutor said, he got the truth. None of the confessions were repudiated in court nor did any of the 305 defendants make allegations of mistreatment. If all be as it appears, that prompt interrogation produced justice." 30 MICH. L. REV. 54 at 59 (1931).

⁸³ CRIMINAL JUSTICE IN AMERICA 88 (1930). See also WICKERSHAM COMM. REP. No. 8, pp. 9, 10 (1930).

⁸⁴ Several unconvincing objections to the plan as a remedy for the third degree should be noted. Justin Miller declares that the police are not interested in a voluntary statement made by the accused before a magistrate. 15 A. B. A. J. 414 at 415 (1929). But this objection presupposes a toothless kind of examination which prohibits interrogation and which brings no pressure on the accused to compel him to speak.

An objection made by Professor Chafee that if the prisoner is committed to jail for contempt on failure to answer, the opportunity for third-degree practices by the police will not be impaired, presupposes commitment as a penalty for maintaining silence. 148 ATLANTIC MONTHLY 621 at 626 (1931). But that is not essential to the plan; it is penalty sufficient that the accused's failure to answer will be admissible at the trial as evidence of guilt consciousness and subject to unfavorable comment.

ment as the only coercive factor would not serve all the purposes served at present by secret police inquiry. It is not difficult to imagine cases, particularly those of hardened recidivists, in which silence would be maintained in face of the magistrate's interrogation despite the unfavorable inference to be drawn therefrom, the accused preferring to gamble on a jury trial. Another possible criticism of the proposed plan of interrogation as a cure for the third degree is that it offers no adequate remedy for the situation resulting from police arrests supported by little or no evidence. False arrests are notoriously common these days, and it has been suggested that third degree practices are in many instances mere "fishing expeditions" for the procurement of information vindicating unwarranted arrests.⁸⁵ If a police officer has taken a man into custody without cause and has no objective evidence tending to link him with a crime, questioning by the magistrate may prove to be a bootless affair; and the only end served by the questioning will be to expose the officer's error in making the arrest. Magisterial interrogation does not satisfy police motives in a case of that kind; in fact, the very contrary conclusion must be reached for no officer will take the chance of this exposure.⁸⁶ With regard to the effectiveness of magisterial interrogation in securing clues as to the whereabouts of stolen property or information of a kindred kind, doubt must also be expressed, for an offender may be willing to talk, either in self-incrimination or in self-exoneration, and yet may refuse to divulge information as to the fruits of his wrongdoing; allowing an inference of guilt to be drawn from silence will not improve this situation. Furthermore, it is doubtful whether interrogation unaccompanied by the use of physical force will result in information from an accused person as to the identity of accomplices. The code of honor among gangster criminals precludes "squealing"; perhaps nothing less than physical force will elicit this kind of information.

In view of these insufficiencies of the method of interrogation proposed, there appears to be some justification for the conclusion of the

⁸⁵ HOPKINS, *OUR LAWLESS POLICE* 98 (1931).

⁸⁶ Perhaps some of the abuses resulting from attempts by the police to justify false arrests would be eliminated by legalizing some types of arrest which are now unlawful. The existing rules as to arrest place undue restrictions upon an officer from the viewpoint of social control. See J. B. Waite, "Some Inadequacies in the Law of Arrest," 29 *MICH. L. REV.* 448 (1931). It has been pointed out that as a consequence of Massachusetts legislation legalizing the arrest by police of a person abroad at night whom they have reason to suspect of unlawful design, there are fewer false arrests by the Boston police; reducing the number of false arrests is in turn reflected in abatement of third-degree practices. WICKERSHAM *COMM. REP. NO. 11*, 108 (1931).

drafters of the American Law Institute's Code of Criminal Procedure that "while the chief reason advanced by those who favor the system [interrogation by the magistrate] is that it will do away with the 'third degree' there is no assurance that such result would follow."⁸⁷ Strong police motives in particular cases will be unsatisfied and officers will continue to use physical force on the prisoner and retain him for prolonged detention accompanied by interrogation unless an order of magistrate or judge intervenes. Professor Morley makes the significant statement that in France, where the preliminary examination by the *juge d'instruction* is a characteristic feature of criminal procedure, "brutality and high-handed methods by the police are not all eliminated by the system of examinations."⁸⁸

The probability that a proposed remedy will not be a panacea for all ills should not, however, blind the critic to its substantial worth. Assuming that magisterial interrogation of the accused will not furnish a complete remedy for the third degree evil, it does not follow that it should be rejected. Not only the real and supposed shortcomings of the proposed plan from the viewpoint of police psychology need to be considered but also its merits from the same viewpoint. It seems probable that the larger number of those now subjected to police interrogation would be taken by the police before a magistrate for immediate interrogation. That itself would be a gain. The implications of this gain are also significant. If in the greater number of instances police voluntarily took the prisoner to a magistrate or justice of the peace for interrogation, police habits would be formed which would have a cumulative effect in undermining the third degree as a police institution. And, in evaluating the probable effectiveness of a system allowing magisterial interrogation, weight must be attached to the effect of the existence of such procedure on the attitude of prosecutor, judge, and magistrate toward third degree practices. As previously pointed out, judge and magistrate cannot be expected to insist on enforcement of the rule requiring prompt production of the accused before a magistrate until some lawful method is substituted for the present system of police interrogation. The substitution of magisterial interrogation should remove motives for conniving at unlawful police interrogation and at the

⁸⁷ TENTATIVE DRAFT NO. 1, 27 (1928). For criticisms of the plan as a remedy for the third degree see the article by Professor Chafee in 148 ATLANTIC MONTHLY 621 at 626 (1931).

⁸⁸ OUR CRIMINAL COURTS 41 (1930). But see the observations as to French practice made under the next heading of the text.

same time furnish the magistrates with an incentive to insist on their own prerogatives.⁸⁹

1. *Possible Objections*

Conceding that third degree abuses would be mitigated by magisterial interrogation, the question remains whether the benefit hoped to be derived would not be more than offset by new evils introduced. The prime objection to a system of magisterial interrogation goes to the danger of its abuse. "In the hands of petty bureaucrats," says Dean Wigmore, "whether under James the First, or under Philip the Second, or in the twentieth century under an American republic, such a system is always certain to be abused."⁹⁰ A magistrate with an unlimited power of interrogation is likely to proceed on the assumption that the accused brought before him is guilty; he tends to become domineering and over-zealous in the effort to ferret out incriminating information; he loses his judicial disinterestedness; leading, ambiguous, and confusing questions characterize his contest with the accused.⁹¹ The experience in France points to the possibility of such abuse.⁹² The questioned prisoner, particularly if he is of a weak and timid character, in the confusion of the moment, is either inveigled or bullied into making false and contradictory statements to be later used against him at the trial with deadly effect.⁹³ The danger of abuses becomes particu-

⁸⁹ Nor should it be forgotten that the proposed plan may be effective in helping to crystallize public opinion against the present system of police interrogation. The failure of the public to become aroused except momentarily over the Wickersham Commission's Report on police lawlessness may be attributed in part to public acquiescence in police methods as supplying a need which our formal procedure does not satisfy. After stating his belief that proposed remedies by way of improvement of criminal procedure would not go far to prevent existing abuses, Mr. Bates Booth, writing in 4 So. CAL. L. REV. 83 at 100 (1930), concludes; "Perhaps there is no solution but the solution of an enlightened public demand." Perhaps the difficulty is not that the public is not *enlightened* but that it is unwilling to *demand* cessation of practices believed essential to safeguard the social order.

⁹⁰ 4 EVIDENCE 823 (1923). In the light of the abuses which Dean Wigmore believes inevitably attend an inquisitorial procedure, it is difficult to understand why he should urge a preliminary interrogation of the accused by a skilled magistrate. 2 EVIDENCE 199 (1923); see *supra*, note 81.

⁹¹ 1 LIVINGSTON, WORKS ON CRIMINAL JURISPRUDENCE 355 (1873); REPORT OF COMMISSIONERS ON CRIMINAL LAW IN THE CHANNEL ISLANDS (1848), found in part in 4 WIGMORE, EVIDENCE 825 (1923). See also *infra*, notes 92 and 93.

⁹² J. W. Garner, "Criminal Procedure in France," 25 YALE L. J. 255 at 260 (1916); WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 205 (1929). For abuses under the old English statutes of Philip and Mary, see text, *supra*, with authorities cited in notes 45 and 46 *supra*. A modern instance of abusive interrogation in an American court is reported in *Commonwealth v. Smith*, 185 Pa. St. 553, 40 Atl. 73 (1898).

⁹³ REPORT OF COMMISSIONERS ON CRIMINAL LAW IN THE CHANNEL ISLANDS

larly acute in the case in which little or no objective evidence has been secured against the accused, and the examination degenerates into a fishing expedition. The prisoner's whole past life is bared for inspection in the hope that there may be revealed some act to which criminal liability may be fastened.⁹⁴ Innocent persons would be subjected to blackmail and extortion at the hands of unscrupulous magistrates.⁹⁵ The viciousness of this feature, it is contended, would be heightened in American practice because of official corruption and the large number of groundless arrests made by the police.

(a) *As to Undue Pressure Used to Obtain Confessions.* When the worst has been said about magisterial interrogation, its vices do not equal those of present police third-degree methods. Among critics of the system of interrogation it has never been claimed that the prisoner is subjected to the pressure of physical torture. Even the early English justice of the peace, acting under the statutes of Philip and Mary, was not accused of doing violence to the prisoner in the process of interrogation. That the police resort to torture is the chief complaint against third-degree practices. If all the objections to magisterial interrogation were as serious as painted and were irremediable, the absence of physical torture under this system would still mark an advance. Of the abuses which have been charged against the system, the most serious is that the magistrate tends to bully and browbeat the prisoner into making incriminatory statements. Certainly a prisoner has to face a trying ordeal in going through an interrogation of that type. But discomfort of the accused is not necessarily unfairness in the larger sense. There is nothing to indicate that the French system results in any higher percentage of unwarranted convictions than our own.⁹⁶ If the prisoner is misled at the interrogation into making false or contradictory statements, he always has the opportunity of explaining these statements to

(1848), found in part in 4 WIGMORE, EVIDENCE 825 (1923); 2 BEST, EVIDENCE 950-978 (1876). See also the criticism found in WAITE'S CASES ON CRIMINAL LAW AND PROCEDURE 619, note 26 (1931), with reference to proposed legislation authorizing interrogation.

A classic example of the French system at its worst is found in Brieux's story, *La Robe Rouge*, an excerpt from which is found translated in MOLEY, OUR CRIMINAL COURTS, Appendix B (1930).

Dean Wigmore is of the opinion that the Continental practice is "united with a spirit of petty judicial license and browbeating, dangerous to innocence. . . ." 4 EVIDENCE 824 (1923).

⁹⁴ See account by E. Kelly, "The French Law of Evidence," 19 AM. L. REV. 380, 397 (1885), of an examination by a French *juge d'instruction*.

⁹⁵ 4 WIGMORE, EVIDENCE 823 (1923).

⁹⁶ See article by E. Kelly, 19 AM. L. REV. 380 at 398 (1885).

a jury at the trial. It is submitted that too large a part of what goes by the name of "unfairness" in such cases is simply a maudlin sympathy for inexperienced but guilty persons. To say that it is unfair to an inexperienced criminal who has not acquired facility in fabricating defense alibis or learned that silence is the safest policy, to subject him to interrogation calculated to expose his guilt, is to exhibit an altogether unwarranted solicitude for the wrongdoer.⁹⁷ A criminal prosecution should not be viewed as a game or contest in which the inexperienced offender has any claim to a handicap so as to put him on an equality with the hardened offender in the race against justice.⁹⁸

Under the American system the danger of real unfairness is lessened by the fact that the magistrate is a strictly judicial officer. In the modern Continental procedure, and the same was true in early English practice, the magistrate who conducts the examination of the prisoner is at one and the same time police officer, prosecutor, and judge. With the functions of these officers all combined in a single person, the temptation to abuse is greater and the possibility is more acute that judicial disinterestedness will succumb to prosecuting zeal. Where, as here, the police magistrate is a judge, it is reasonable to expect that he will display a sense of judicial propriety and restraint in questioning the accused. But it might be desirable, in line with the notion of separating judicial and prosecuting functions, to vest the primary power of interrogation in the prosecuting attorney rather than in the magistrate. It might be felt that the prosecutor would be more adept in questioning prisoners; and the magistrate would have less reason to lose his quality of judicial disinterestedness. Those favoring a system of interrogating the accused may accept this alternative proposal without serious objection provided that the plan were flexible enough to allow the magistrate to interrogate if the prosecutor were unable to be present. Sometimes the prosecutor or his deputy would not be available at the precise moment, yet the interrogation should not be halted on that account, for questioning loses much of its value unless it takes place immediately.

⁹⁷ The argument that interrogation would not be "fair" to the prisoner is included in the criticism quoted in WAITE'S CASES ON CRIMINAL LAW AND PROCEDURE 619, note 26 (1931), of proposed legislation authorizing magisterial interrogation. See 30 MICH. L. REV. 54 at 60 (1931).

Much the same considerations apply to "unfairness" in questioning persons who, though not personally guilty, are endeavoring to shield the guilty and who would, of course, *prefer* not to be subjected to interrogation.

⁹⁸ On the idea of "fairness" to the prisoner, or the "fox-hunter's reason," see 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 238 (1827).

Furthermore, public opinion should serve as an effective check on abuses of power by the magistrate. This public opinion would operate in two ways. It would frown upon arbitrary acts by a judge which it might condone if they were done by a policeman. And public opinion would make itself felt through the ballot. The magistrate's office is usually an elective office. With all responsibility for interrogation centered in him, unfavorable publicity that might leak out as to high-powered methods used on prisoners would react with disastrous effect on his political fortunes.

Another possible check on arbitrariness which suggests itself is to allow the prisoner the right to counsel during interrogation. But such a suggestion encounters serious objections. If time must be allowed until counsel is procured, the preliminary interrogation will lose its effectiveness. Its value depends upon interrogation immediately upon arrest.⁹⁹ There is the additional objection that the attorney's mere physical presence will give the prisoner a moral support which will interfere with that psychic state which guarantees the effectiveness of the proposed interrogation. And the attorney will discourage spontaneity of responses by his client, urge him to be guarded in his replies, encourage him to fabricate a denial or alibi, and make vexatious objections to questions put by the magistrate, so that the procedure will be throttled at this point.¹⁰⁰ It is submitted, therefore, that to grant to the prisoner the right to counsel during the interrogation will defeat the very purpose of the plan.¹⁰¹

⁹⁹ Referring to the psychological phenomenon presented by the case of a suspect making a confession immediately after arrest upon solicitation by the police, Dean Wigmore says that the "explanation seems to be that the long-continued nervous inhibition of all utterances, in fear of revealing clues to guilt, imposes a terrific strain, like that of a tightened steel spring; that the arrest shows the guilty person that this strain of repression is futile and is no longer needed; and that hence, in the sudden release of the inhibition, it is a genuine relief to be able to tell freely the whole story. *After this sense of nervous relief has passed, the inclination to tell disappears; and most confessions are in fact made within a short time after arrest*" (italics the writer's). 2 EVIDENCE 198, note 3 (1923).

¹⁰⁰ See W. H. Taft, "The Administration of Criminal Law," 15 YALE L. J. 1 at 8 (1905); E. Kelly, 19 AM. L. REV. 380 at 398 (1885). According to Professor Garner there is some dissatisfaction in France with the change effected by the law of 1897 which gave the accused the right to counsel during the preliminary examination by the *juge d'instruction*. M. Loubat, *Procureur-Général* of Lyons, is quoted as saying: "It is permissible to say without exaggeration that the law of 1897 has given to malefactors rights the need of which is not felt and which are exercised only to the detriment of those of society." 25 YALE L. J. 255 at 259, note 16 (1916).

¹⁰¹ It is true that right to the assistance of legal counsel seems to be considered essential by a number of students of criminal procedure, including those who advocate the type of preliminary examination that is characterized by interrogation of the

(b) *As to "Fishing Expeditions."* The objection that interrogation would degenerate into a mere fishing expedition in the hope of uncovering a shady spot in the accused's career proceeds on the premise that the proposed plan of interrogation would give the magistrate an unbounded power of inquiry. This is true of French procedure. But the magistrate should be limited to the specific charge for which the accused is under arrest. What assurance is there that the magistrate would so confine his questioning? In the first place, a complete record should be kept of the interrogation, to be presented at the trial later. If improper questions have been asked, such questions and the responses thereto would be ruled out as inadmissible in evidence. Secondly, the magistrate would not be under the same inducement to conduct a fishing expedition as is a police officer under the present system. As stated previously, much prolonged interrogation by the police results from the attempt to justify an unwarranted arrest. That motive would be absent in the case of magisterial questioning.

(c) *As to Blackmail and Extortion.* The objection of Dean Wigmore that inquisitorial examination of the accused will lead to blackmail and extortion of the innocent is founded on experience in Continental countries and in early England. Again the point is important that the magistrate under our system is a strictly judicial officer. In Continental countries (and in early England), the magistrate has police and prosecuting functions as well. With all of the steps in the preliminary procedure in the hands of a single person, the opportunity for extortion is particularly inviting. Whereas with the differentiation in function provided by our system, mutual checks are created which reduce the chance that innocent persons will be subjected to threat of exposure. Conceding that there may be some abuse of that kind, it is denied that it constitutes a serious impeachment of the proposed plan. Also it should be repeated, as to this danger, that the present system of police interrogation lends itself more easily to this form of abuse than the system which is proposed.¹⁰²

accused. See Irvine, 13 CORN. L. Q. 211 at 217 (1928); Z. Chafee, Jr., 40 NEW REPUBLIC 266 at 267 (1924); WICKERSHAM COMM. REP. No. 11, 5 (1931). Esmein, in his HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 601 (1913), rates the French legislation of 1897 giving the prisoner the right to counsel as one of the "measures which place the French system of law in the vanguard of progressive legislation." But see supra, note 100.

¹⁰² Another evil particularly emphasized by Dean Wigmore is that "any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby." 4 EVIDENCE 824 (1923). See also an article by A. L. Lowell, "The Judicial Use of Torture," 11

(d) *As to Lack of Skilled Magistrates.* An objection which goes not to danger of abuse but to possible effectiveness is that the system requires skilled magistrates who are not available in our political system. Expert questioning that would uncover flaws in the accused's story, bare inconsistencies, and by stratagem catch him off guard represents an art developed by training and experience, and requires as a foundation an intimacy with principles of judicial proof. How effectively the power of interrogation would be exercised by justices of the peace — often laymen — and police magistrates, is problematical. The draftsmen of the American Law Institute's Code of Criminal Procedure considered this a serious obstacle to the introduction of the Continental system.¹⁰³ Conceding that these judicial officers do not have the skill and training essential to interrogation of the most efficacious type, it is not to be inferred that the system would mark no improvement over present police methods. Objectors are constantly overlooking the fact that the first concern is to mitigate abuses of the present practice. Police-lieutenants and detectives have even less skill and training for the task of interrogation than police magistrates and justices of the peace could be expected to have. There are, in fact, police lieutenants and detectives who have acquired proficiency in the art of interrogation despite the lack of formal training. Constant practice has produced skill and facility. In gauging the capacity of the average magistrate to conduct a skillful interrogation of the prisoner, allowance must be made for the restrictions hitherto placed on his power of interrogation. If police-officers and detectives can acquire a measure of skill in the art of examination, the same result may be fairly anticipated with regard to magistrates.

2. *Constitutional Questions*

(a) *The Right to Counsel at the Interrogation.* It may be questioned whether legislation would be valid which deprived the prisoner of the right to counsel at the interrogation before a magistrate.¹⁰⁴ The question has never been before the courts for decision, so that an answer can represent only conjecture. The courts have considered the

HARV. L. REV. 290 at 299 (1897). The simplest answer to this objection is that the morale of the administration of justice will not be impaired as much under the proposed plan as it is under the present third-degree system.

¹⁰³ AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 27 (1928). A like view is expressed by Professor Chafee in 148 ATLANTIC MONTHLY 621 at 626 (1931).

¹⁰⁴ For constitutional provisions of this kind, see AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 190, *et seq.* (1928).

question whether the right to counsel extends to the modern type of preliminary examination and have divided on that question.¹⁰⁵ At first sight it might appear that an interrogation of the accused made a still stronger case for vindication of the constitutional guarantee of right to counsel. But it is submitted that the constitutional right does not extend to the proposed system of judicial interrogation. This right is like the right of the accused to be confronted by the witnesses against him and the right to cross-examine them. All these rights apply to a judicial hearing in which guilt or probable guilt is to be determined. They do not apply to inquiries by the police, by the prosecutor, or by the grand jury, intended merely for the purpose of acquiring evidence.¹⁰⁶ Even by the most severe critics of modern police methods no claim has been made that private police interrogation of the accused intended to elicit a confession violates his right to counsel. A voluntary confession to the police is always admissible in evidence; where a confession is excluded it is not on the ground that the accused is denied the right to counsel but on the ground that the confession is involuntary. The same principle applies to confessions made to the magistrates. There is no reason why an interrogation aimed at obtaining a confession should be transformed in constitutional character merely by the fact that it is conducted with proper safeguards and by an officer who, on other occasions, exercises strictly judicial powers.

(b) *The Privilege Against Self-Incrimination.* "No person . . . shall be compelled, in any criminal case, to be a witness against himself," is the provision of the federal Constitution, and the provisions of the state constitutions are similar in effect.¹⁰⁷ Are these provisions violated by a procedure which requires the accused to submit to interrogation by a magistrate and permits comment at the trial on his refusal to answer questions at the interrogation? This question naturally divides itself into two:

Do the constitutional provisions grant to the accused a complete immunity from interrogation? And if they do not,

Does the indirect pressure furnished by threat of comment on his refusal to answer questions "compel" him to be a witness against himself in violation of the privilege?

¹⁰⁵ The cases are collected in AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT No. 1, 193 (1928).

¹⁰⁶ Reference is here made to the case where the grand jury is conducting an investigation.

¹⁰⁷ For a collection of provisions in state constitutions securing the privilege against self-incrimination, see AM. L. INST. ADMIN. OF CRIM. LAW, TENTATIVE DRAFT No. 1, 35 *et seq.* (1931).

(1) *As to Interrogation.* It must be admitted at the outset that compulsory interrogation is forbidden on all occasions. It matters not whether it be interrogation at the trial, at the preliminary hearing,¹⁰⁸ or at some police or magisterial inquisition prior to either.¹⁰⁹ In fact, historically it was the application of the oath "ex officio" at the preliminary inquiry which provoked the struggle resulting in the establishment of the rule against self-incrimination.¹¹⁰ It is submitted that we must differentiate carefully between interrogation *simpliciter* and interrogation under compulsion, and that the former does not constitute a violation of the constitutional privilege. Certainly it has been and continues to be the practice in some states for the magistrate to question the accused after warning him that he need not answer, and it has never been suggested that this practice was unconstitutional. And no one has ever suggested that interrogation by the police of a suspect was unconstitutional, unless it was accompanied by physical violence or other unlawful pressure. It is inconceivable that express statutory authorization of magisterial interrogation designed to eliminate the abuses of police methods should be regarded as constitutionally more objectionable.¹¹¹

(2) *As to Comment on Refusal to Answer.* Assuming that interrogation as such is not prohibited, would a statute authorizing comment on refusal to answer questions put by the magistrate be unconstitutional? That the possibility of such comment brings a psychic pressure to bear on the accused impelling him to speak is evident;¹¹² in fact this pressure is the very object of the provision. The constitutional question is whether it is such compulsion as violates the privilege.¹¹³ There is good authority for the opinion that such a statute would violate the

¹⁰⁸ 4 WIGMORE, EVIDENCE 835 (1923).

¹⁰⁹ There is an increasing tendency to call third-degree practices of the police unconstitutional. See cases collected in WICKERSHAM COMM. REP. No. 11, 27 (1931); HOPKINS, OUR LAWLESS POLICE 306, *et seq.* (1931).

¹¹⁰ 4 WIGMORE, EVIDENCE 823 (1923).

¹¹¹ It is true that questioning of the accused has often been referred to as inimical to the spirit of the privilege. See FOURTH REPORT OF NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS—CODE OF CRIMINAL PROCEDURE, xxvii (1849); *In re Bates* (D. C. S. C. 1858) 2 Fed. Cas. No. 1099a; *Kelly v. State*, 72 Ala. 244 (1882); *Commonwealth v. Smith*, 185 Pa. St. 553, 569, 40 Atl. 73 (1898).

¹¹² This appears from an inquiry conducted among Ohio prosecuting attorneys as to the effectiveness of the Ohio constitutional amendment of 1912 allowing comment. W. T. Dunmore, "Comment on Failure of Accused to Testify," 26 YALE L. J. 464 at 466 (1917).

¹¹³ It has been held that allowing comment on failure to testify at the trial is not a denial of due process under the Constitution. *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97 (1908).

privilege against self-incrimination.¹¹⁴ But this opinion, it is believed, is not supported by a consideration of the purpose of the privilege and the relevant cases. Historically, the privilege grew out of the employment of legal process to extract from the person's own lips an admission of his guilt.¹¹⁵ And in face of our modern unequal struggle with crime, there is no good reason for extending the scope of the privilege beyond the purpose for which it was originated. Under the proposed plan for interrogation the accused still has his election to speak or to keep silent; he is not — as any other witness would be in the circumstances — committed for contempt for his refusal to speak. To use the constitutional language — he is not compelled to be a witness against himself. Insofar as his silence exposes him to an inference of guilt, he is merely subject to the effect of an ordinary rule of evidence applied in all other instances where appropriate. Drawing such an inference from a refusal to answer questions which a person would naturally answer if innocent is an inevitable logical process based on human experience and common sense.¹¹⁶

There are no direct authorities on the point. The closest analogy is furnished by the right of the court or prosecutor to comment on the failure of the accused to testify at the trial. Even as to this right the direct authorities are few. This is due to the fact that, under the old common-law practice, the question of comment could not arise. The accused, like parties to a civil action, was incompetent as a witness and could not take the stand in his own behalf. Silence under such circumstances was meaningless. When "criminal evidence acts" for the first time made the accused a competent witness at the trial, they generally provided that the prisoner's failure to take the stand should not give rise to any inference or presumption against him, and that it should

¹¹⁴ AM. L. INST. CODE OF CRIM. PROC., TENTATIVE DRAFT NO. 1, 27 (1928); COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed., 447 (1903); 15 MICH. L. REV. 423 at 424 (1917).

¹¹⁵ 4 WIGMORE, EVIDENCE 863 (1923). See also *infra*, note 124. Wigmore apparently concedes that allowing the inference to be drawn would not be unconstitutional, although he believes it would result in emasculation of the privilege. 4 EVIDENCE 899, 890.

¹¹⁶ Storey, 4 J. CRIM. L. 495 at 501, 505 (1913); Baldwin, 6 A. B. A. REP. 225 at 233 (1883); 29 MICH. L. REV. 783 (1931).

Dean Wigmore is of the opinion that allowing an inference to be drawn from failure to testify would have the same disastrous effect in weakening the morale of the administration of justice as would a rule compelling the accused to testify under pain of judicial process. 4 EVIDENCE 900 (1923). But it is submitted that the proposed plan will not constitute as great a threat to the undermining of police morale as does the present third-degree system.

not be subject to comment by court or prosecutor.¹¹⁷ The English statute, however, was narrower; it only prohibited comment by the prosecution. It was held not to prohibit comment by the court on the accused's failure to testify.¹¹⁸ This interpretation may be explained merely as an application of an ordinary canon of statutory construction. But it is not without great significance that this interpretation has been adopted in England where the rights of accused persons have been so meticulously safeguarded by the courts. The right of the court to comment on the accused's failure to take the stand is in effect held not to be violative of the purpose of the privilege against self-incrimination. In New Jersey the question was even more definitely presented. After a statute made the accused a competent witness in his own behalf, it was held that the common-law privilege against self-incrimination did not prohibit comment by the court on the accused's failure to take the stand.¹¹⁹ The decisions in Maine in the face of a constitutional provision regarding self-incrimination reached the same result.¹²⁰ It appears, then, that respectable authority sustains the proposition that the privilege against self-incrimination does not preclude comment on failure of the accused to testify. Opposed to these actual holdings are not a few statements to the effect that a statute authorizing comment would be unconstitutional.¹²¹ But, as Judge Hiscock of the New York court of appeals has pointed out, these statements are mere dicta, not actual holdings, since in each case the statute did prohibit comment or at least was construed not to authorize such comment.¹²² Under the federal Constitution it is extremely improbable that an act of Congress authorizing comment

¹¹⁷ For collection of statutes see 4 WIGMORE, EVIDENCE, sec. 2272 (1923); AM. L. INST. ADMIN. OF CRIM. LAW, TENTATIVE DRAFT No. 1, 37, *et seq.* (1931). Where the statute forbids drawing an inference from the accused's failure to testify, it applies to any preliminary proceeding as well as the trial itself. *Swilley v. State*, 73 Tex. Cr. 619, 166 S. W. 733 (1914); 4 WIGMORE, EVIDENCE 902 (1923).

¹¹⁸ *The Queen v. Rhodes*, L. R. [1899] 1 Q. B. 77, 83. See also *Kops v. Regina* [1894] A. C. 650.

¹¹⁹ *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651 (1898).

¹²⁰ *State v. Bartlett*, 55 Me. 200, 216 (1867); *State v. Cleaves*, 59 Me. 298 (1871). See also dictum in *Phillips v. Chase*, 201 Mass. 444, 450, 87 N. E. 755 (1909).

¹²¹ *People v. Tyler*, 36 Cal. 522, 529 (1869); *Petite v. People*, 8 Col. 518 (1885); *Commonwealth v. Scott*, 123 Mass. 239 (1877); *Ruloff v. People*, 45 N. Y. 213, 221 (1871); *Staples v. State*, 89 Tenn. 231, 233, 14 S. W. 603 (1890); *State v. Cameron*, 40 Vt. 555, 565 (1868).

¹²² "Criminal Law and Procedure in New York," 26 COL. L. REV. 253 at 260 (1926). In *People v. Reese*, 258 N. Y. 89, 179 N. E. 305, 309 (1932), Mr. Justice Cardozo added a word of caution: "We have no thought in thus holding to inti-

on the prisoner's refusal to take the stand or answer questions put by a magistrate would be held unconstitutional as violating the self-incrimination clause. In *Twining v. New Jersey* there was involved the validity of a New Jersey practice which permitted comment on the failure of an accused to testify.¹²³ The Supreme Court assumed for the purpose of the argument that the practice would violate a constitutional provision against self-incrimination, but held that it did not contravene the due process clause of the Constitution. The court was careful to call attention to the fact that it only assumed, and did not hold, such practice to be violative of a provision against self-incrimination. Mr. Justice Moody, speaking for the court, said: "We do not intend, however, to lend any countenance to the truth of that assumption." And Professor Corwin, speaking to the same point in a recent excellent article, says, "It is highly doubtful if the Supreme Court regards this doctrine [that the court has no right of comment] as sanctioned by the Constitution."¹²⁴ To confine the privilege within narrow limits seems to be the tendency of the courts at the present time.¹²⁵ Adoption by Ohio of a constitutional amendment authorizing right of comment on failure of the prisoner to testify,¹²⁶ and recent legislation effecting the same change in Iowa, South Dakota, and, apparently, in Louisiana, are indicative of a legislative tendency in the same direction.¹²⁷ The

mate a belief that a statute permitting adverse comment in such circumstances would impair the constitutional privilege against self-incrimination."

¹²³ 211 U. S. 78, 114, 29 Sup. Ct. 14, 53 L. ed. 97 (1908).

¹²⁴ 29 MICH. L. REV. 191 at 200 (1930).

The late Chief Justice Taft was of the opinion that the privilege was intended to protect only against torture in extorting testimony from the accused's own lips. 15 YALE L. J. 1 at 9 (1905). See also statement from Mr. Justice Cardozo, quoted *supra*, note 140, in an opinion delivered while yet on the New York court of appeals.

Judge Baldwin was of the opinion that the privilege was not so broad as to include freedom from inference and comment. 6 A. B. A. REP. 225 at 240 (1883). See also Judge Knox's views expressed in 74 U. PA. L. REV. 139 at 149 (1925).

¹²⁵ In *United States v. Murdock*, 52 Sup. Ct. 63, 76 L. ed. 83 (1931), it was held that the possibility of incrimination in a state jurisdiction did not warrant the assertion of the constitutional privilege in federal proceedings. See comment in 41 YALE L. J. 618 at 621, 624 (1932); 45 HARV. L. REV. 595 (1932); 30 MICH. L. REV. 1116 (1932).

In *State v. Ford*, 109 Conn. 490, 146 Atl. 828 (1929), it was held that a statute prohibiting comment did not protect the prisoner from any unfavorable inference that the court might draw from the prisoner's exercise of his privilege. See comment on the case in 16 VA. L. REV. 79 (1929) and 28 MICH. L. REV. 78 (1929).

¹²⁶ Constitution of 1851, art. 1, sec. 10, amendment of 1912.

¹²⁷ Iowa Sess. Laws of 1929, p. 311; S. D. Sess. Laws of 1927, p. 116; La. Code of Crim. Proc., 1929, art. 461, by omission of the final clause which appeared in 3 Wolff's Stat., 1920, p. 2217, "and his neglect or refusal to testify shall not create any presumption against him," apparently sanctions comment by both the judge and

opinion is ventured that statutes authorizing comment on the failure of the accused to testify will, when tested, be sustained as valid. On the same reasoning, comment on the refusal of an accused to answer questions at a magisterial interrogation should be upheld.

In conclusion, it is submitted that the proposed plan requiring the accused to submit to interrogation before a magistrate immediately upon arrest and making his silence the subject of inference and comment at the trial is not violative of the privilege against self-incrimination. Mere interrogation of the accused without undue pressure is not violative of his privilege. Nor, considering the purpose of the privilege and its history, should a threat of comment on the refusal of the accused to answer questions be deemed compulsion so as to vitiate a statute providing for magisterial interrogation.

the prosecuting attorney. AM. L. INST. ADMIN. OF CRIM. LAW, TENTATIVE DRAFT No. 1, 40 (1931). The constitutional question will not arise in Iowa since the privilege against self-incrimination is not embodied in the organic law; in South Dakota and Louisiana the constitutional issue has not yet been raised.